APPENDIX

[Part VI of Court of Claims Opinion in *Mason* v. *United States*, decided June 16, 1972]

VI

"The current standing of West v. Oklahoma Tax Commission

"Appraisal of the applicability of the tax necessarily thrusts us into an inquiry on the current status of *West v. Oklahoma Tax Comm'n, supra*, 334 U.S. 717 (1948). For an inferior tribunal this is a most delicate undertaking. It goes without saying that we cannot refuse or fail to follow a Supreme Court decision, directly in point, because we disagree with its reasoning or think it erroneous. See, *e.g., McCorkle* v. *The First Pennsylvania Banking & Trust Co.*, C.A. 4, decided April 20, 1972 (Sobeloff J.), 40 LW 2725. But our responsibility differs where there have been significant developments—in the Supreme Court itself, in the lower courts, and in relevant administrative practice—showing that the underpinnings of the highest court's decision have been seriously weakened or eroded. If that is so, a lower court can properly, without disrespect or flouting authority, make the judgment, in due care and circumspection, that the Court will no longer follow its earlier holding. *See, e.g., Barnette* v. *West Virginia State Board of Ed.*, 47 F. Supp. 251, 252-53 (S.D. W. Va. 1942) (Parker J.), *aff'd*, 319 U.S. 624 (1943); *United States* v. *Girouard*, 149 F.2d 760, 765-67 (C.A. 1, 1945) (Woodbury J., dissenting), *rev'd*, 328 U.S. 61 (1946); *Andrews* v. *Louisville & Nashville R.R.*, 441 F. 2d 1222 (C.A. 5, 1971), *aff'd*, U.S. Sup. Ct., No. 71-300, decided May 15, 1972, 40 LW 4511.

The history in Part IV, *supra*, shows, in our view, that there has been just such a significant development with respect to *West*—beginning with *Squire* v. *Capoeman*, 351 U.S. 1, in 1956. There has been a marked change in the evaluation of the reasons given by the Court for its result in *West* (and the precursor, *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598 (1943)), and there has also been a considerable increase in the kinds of taxes with respect to which restricted Indian property has been held immune. In several crucial aspects the essential bases of *West* have been so weakened that, in our opinion, the decision no longer stands as authoritative.

A. Following the lead of *Oklahoma Tax Comm'n* v. *United States*, *supra*, the *West* opinion put aside as immaterial the facts that, if the tax was leviable, Oklahoma could impose a lien on the property (334 U.S. at 725) and the estate could be much depleted through successive payments of state death taxes before the end of the trust period (334 U.S. at 725-26, 727). *Squire* took the opposite positions that (1) provision in an allotment statute that the property was to be transferred, at trust end, free of all charge or incumbrance "might well be sufficient" to bar taxation (351 U.S. at 6-7), and (2) it is necessary to preserve the property wholly intact for the Indian—including immunity from taxation—so that he can "go forward when declared competent with the necessary chance of economic survival in competition with others" (351 U.S. at 10).

Again, *West* demanded affirmative indications by Congress "that these burdens require that the transfer be immune" from tax liability (334 U.S. at 727). See also *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 604, 606, 607, 609. *Squire*, reversing the presumption, considered these burdens so important that Congress should affirmatively authorize taxibility if the desire was to permit it.

Thus, both of the main foundations for *West* (and *Oklahoma Tax Commission*) were disavowed in *Squire* v. *Capoeman*. It is this latter approach which has been uniformly applied in the subsequent lower court cases and administrative rulings referred to in Part IV, *supra*. The *West-Oklahoma Tax Commission* attitude has been silently dropped, and its reasoning no longer utilized. As their texts reveal, those two opinions were the yield of a period in which the Supreme Court was intent on doing away with the various forms of intergovernmental tax immunity, and Indian tax exemption had been supported on that theoretical basis. For at least the last fifteen years, the judicial climate has changed to concentrate, not on the relationship of Indian tax immunity to other exemptions, but on the particular social goals Congress has sought to reach through its restrictions on Indian properties.

B. It seems clear, too, that in deciding *Oklahoma Tax Comm'n* and *West*, the Supreme Court thought (at that time) that restricted Indians were subject to both federal income and estate taxes with respect to restricted and trust property—and that this was an important factor in the decisions. The *Oklahoma Tax Commission* opinion indicates this very plainly. 319 U.S. at 601, 608, including fn. 12 (relating to the federal estate tax). The Court referred (at 601) to *Superintendent* v. *Commissioner*, 295 U.S. 418, as broadly holding "that the restricted income of Indians was subject to the federal income tax" (see note 8, *supra*), and observed (319 U.S. at 608): "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes." [12]

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[12] The brief for the United States, on behalf of the Indians, in *Oklahoma Tax Commission* expressly agreed that the federal estate tax was applicable.

In *West*, the briefs before the Supreme Court show that the Oklahoma Tax Commission (the appellee) stressed that Osage trust properties were then subject to both federal income tax and federal estate tax; as to the latter, the brief included a letter from the Commissioner of Internal Revenue saying that federal estate taxes were being imposed on and collected from estates of restricted Osage Indians.[13] West's brief did not dispute this assertion.

Today the situation is very different. *Squire* distinguished *Superintendent* v. *Commissioner*, *supra*—despite its unqualified language—as limited to reinvestment income (351 U.S. at 9), and held direct, initial income of those restricted Indians nontaxable. Income from Osage properties of the kind now at stake has been specifically held not subject to federal income tax. *Big Eagle* v. *United States*, *supra*, 156 Ct. Cl. 665, 300 F. 2d 765 (1962). And the Internal Revenue Service has ruled that this property is likewise immune from the federal estate tax (see Part IV, *supra*). The demand for equal treatment of state and federal taxes, which seemed to move the Court in *Oklahoma Tax Commission* and *West*, now works the other way—against taxibility.[14]

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[13] The Service limited this determination to estates of Indian decedents dying after June 25, 1940, when it was decided to impose the tax on this type of estate.

The vagaries of federal income taxation of restricted Indian income are recited in the Supplemental Memorandum for the Petitioner, in *Squire* v. *Capoeman*, U.S. Sup. Ct., Oct. Term 1955, No. 134. At the time of *West* and *Oklahoma Tax Commission* it appears that the tax was being collected under an opinion of the Attorney General holding it applicable. See, also, *Squire*, 351 U.S. at 8-9.

[14] In *Landman* v. *United States*, 103 Ct. Cl. 199, 209-10, 58 F. Supp. 836 (1945), this court indicated that property exempt from state estate taxes was also necessarily exempt from the federal estate tax; and in the decision which led to *West* the Supreme Court of Oklahoma considered that state and federal immunity or lack-of-immunity was correlative. *Yarbrough* v. *Oklahoma Tax Comm'n*, 200 Okla. 402, 193 P. 2d 1017, 1020-21 (1947), *aff'd*, 334 U.S. 841 (1948).

C. Though *Squire* dealt with the General Allotment Act and the Osage statute contains different wording, the developments since *Squire* have shown that no distinction should be made on the basis of the particular language of the various pieces of Indian allotment legislation. The lower courts have applied the *Squire* principles to Indians not covered by the general act (*Kirkwood* v. *Arenas; Big Eagle* v. *United States; United States* v. *Hallan*), and the Internal Revenue Service has used them for the Osages (Technical Advice Memo, Aug. 15, 1969). See Parts IV and V A, *supra*. As both this court (in *Big Eagle*) and the Revenue Service have said, the terms of the Osage Allotment Act (see Part IV A, *supra*) are sufficiently close to those of the General Allotment Act to require the same approach and the same reading.[15]

D. Nor can we properly distinguish *Squire* as involving an income tax, not a death levy. *West*, it is true, does differentiate death taxes from property taxes as "imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits" (334 U.S. at 727). This dissimilarity seems to have been noted solely in connection with that taxpayer's argument that there was a difference between the Indian-owned-but-restricted property in *Oklahoma Tax Commission* and the United States-owned-trust property in *West*; the Supreme Court uses the incidence of the estate tax to show that the difference from *Oklahoma Tax Commission* was not meaningful in the context of tax immunity.

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[15] In particular, the portions of the Osage Act which forbid trust assets from being "subject to lien, levy, attachment, or forced sale to satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency", and provide that "all royalties and bonuses arising therefrom [the Osage mineral lands] * * * shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law."

In any event, the *Squire* rationale, rather than this distinction in *West*, has been carried over to death taxes by the Internal Revenue Service (for federal estate taxes)[16] and by lower courts (for both federal and state death taxes). See Part IV, *supra*. We, too, see no reason for carving out estate and inheritance taxes for separate treatment. The *Squire* principles—especially the warning against diminution of restricted assets through payment of taxes—apply at least equally, perhaps even more, to death levies with their possible successive and cumulative impact before the restriction ends.

E. *Squire* related, of course, to a federal tax, and we are now concerned with a state impost, but that does not make the *Squire* reasoning irrelevant. As we have pointed out, the same factors which influenced the Court to find immunity from the federal income tax in the allotment legislation are present for death taxes, state or federal. The Internal Revenue Service has agreed for the federal estate tax. It is clear that Congress has the power to immunize these restricted properties from state levies.[17] *Cf. Warren Trading Post Co.* v. *United States*, 380 U.S. (1965); *Williams* v. *Lee*, 358 U.S. 217 (1959). And it would be strange and uncharacteristic for Congress to withhold the federal estate tax (on the ground it could deplete the corpus) but to authorize the comparable state levy.

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[16] Defendant's brief says candidly that "Revenue Ruling 69-164 [see Part IV, *supra*] has the appearance of being contrary to the decision of the Supreme Court in *West*." There is, however, no suggestion that the ruling is being (or has been) repudiated.

[17] No argument is made by the defendant or Oklahoma that Congress is without power to exempt such Indian estates from state taxation.

However, a statement in *Oklahoma Tax Commission* is stressed—"If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our National policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state." 319 U.S. at 609. That observation was probably made in the belief that federal income and estate taxes were collectible (see Part VI B, *supra*), an assumption no longer so. Moreover, Oklahoma does not now appear to be singled out; since *Squire*, other states inhabited by Indians with restricted property are no doubt under the same disability. See *Kirkwood* v. *Arenas*, *supra*, 243 F. 2d 863 (C.A. 9, 1957) (California inheritance tax).[18]

F. At the end of the *West* opinion, the Court appends the unelaborated remark that *Oklahoma Tax Commission* "makes clear that should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes. No such properties are here involved, however." 334 U.S. at 727-28. When it adopted those sentences, the Court, in all probability, considered the Osage trust properties to be subject to federal income tax (Part VI B, *supra*), and that may have been the reason why it thought no properties exempt from direct taxation were there involved. The income tax is often characterized as a "direct tax" (that is why the Sixteenth Amendment had to be adopted, *cf. Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 158 U.S. 601 (1895)). Currently, however, income from Osage trust property is exempt. The final qualification in *West* may therefore have be-

[18] In quite different contexts, the Osage Allotment Act contains a few express provisions for taxation by the state. It is not argued that any of these apply to the estate tax as involved here, and we are satisfied that they do not.

come effective to remove the restricted property from the state tax even under the *West* opinion itself.[19]

G. On these grounds, we feel compelled to conclude that, because of the developments from *Squire* on, the *West* result is no longer controlling on us, and the opposite holding is mandated here. This leads directly to our ruling that the state tax was not owed, and that plaintiffs are entitled to recover from the United States for its breach of fiduciary duty in paying the tax when it should not. We may turn out to be mistaken, but the decision we make is the one we believe would be "the event of an appeal in the case before us" (Judge Learned Hand, dissenting in *Spector Motor Service, Inc.* v. *Walsh*, 139 F. 2d 809, 823 (C.A. 2, 1943)).[20]"

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[19] On the other hand, the Court may possibly have meant to include only property which is immune from direct property taxation (see *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 610-11). Congress has expressly authorized Oklahoma to collect a gross production tax on minerals, before the headright pro-rata income distribution is made. Acts of March 3, 1921, 41 Stat. 1249, and of April 25, 1940, 54 Stat. 168. Perhaps the Court considered this tax as showing that the involved properties had not been exempted by Congress from direct taxation.

Since defendant sees this production tax as somehow supporting the imposition of the state death tax, we note that we cannot infer from an express and limited grant of power to tax a more general and unlimited right which is unexpressed.

[20] Judge Hand said:

"It is always embarrassing for a lower court to say whether the time has come to disregard decisions of a higher court, not yet explicitly overruled, because they parallel others in which the higher court has expressed a contrary view. I agree that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain an appeal in the case before the lower court, or the parties may not choose to appeal. In either event the actual decision will be one which the judges do not believe to be one which the higher court would make. * * * Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty to to divine, as best it can, what would be the event of an appeal in the case before it."